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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

On Appeal From the Supreme Court of Ohio and From the Court of Appeals, First Appellate District, State of Ohio

RESERVE LIFE INSURANCE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

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STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

QUESTION PRESENTED

The question presented by this case is as follows:

When an Ohio statute which imposes an *ad valorem* tax upon personal property used in business is applied to a foreign insurance company, is there a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States merely because the franchise tax upon domestic insurance companies is *in lieu* of all other taxes upon the property and assets of domestic insurance companies except for taxes upon real estate?

STATEMENT OF THE CASE

The summary of facts set forth by the appellant's Statement of the Case is substantially correct. However, one addition and one clarification appear to be in order.

The personal property upon which the *ad valorem* tax involved in this case was assessed, consists of furniture and equipment owned by the appellant and used in business by the appellant in various counties in the State of Ohio.

A foreign insurance company would, under the Ohio law, be subject to exactly the same real estate tax *rates* as a domestic insurance company, provided each owned real estate located in Ohio and in the same taxing district, or in taxing districts with identical tax rates. The facts in this case are stipulated, and there is no stipulated fact, evidence or testimony of record which indicates that the appellant herein owned, or owns, any real estate in the State of Ohio.

SUMMARY OF ARGUMENT

In Ohio's taxing structure the taxation of the franchise of a domestic insurance company and the personal property of such a company is interrelated, with the franchise tax being set at such a rate that the legislature determined that it should be *in lieu* of an *ad valorem* tax upon personal property used in business by such a company. The franchise tax levied upon foreign insurance companies is not *in lieu* of an *ad valorem* tax upon the personal property used by them in business in Ohio. The effect of the tax structure, in its entirety, is in favor of domestic companies but entirely within the bounds of preference permitted by the Fourteenth Amendment for the purpose of serving the public interest. The basis upon which it is conceived is clearly rational. The appellant's challenge runs primarily to the mode or manner employed by Ohio in arriving at this entirely reasonable and proper result.

Where two or more proper modes of arriving at an entirely permissible result are available, the one employed by a state cannot be declared unconstitutional merely because the taxpayer affected would have preferred that a different mode be employed.

In exercising the right of engaging in the insurance business in Ohio, the appellant is not a person within the scope of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

I—When Viewed in Its Entirety the Challenged Statute Is Constitutional

The appellant admits at the outset of its brief that only the constitutional validity of one tax, namely, Ohio's *ad valorem* tax on tangible personal property used in business, is involved in this case. However, the appellant immediately launches into a discussion of the Ohio franchise tax law applicable to domestic and foreign insurance companies. It is thus apparent that appellant's challenge of Ohio's *ad valorem* tax is not based upon alleged discrimination between the treatment of the personal property used by the appellant in its business, in Ohio, and the personal property used by persons resident of Ohio in their businesses generally. Rather, appellant's challenge is based upon an alleged discrimination in the treatment of that personal property used in business by the appellant, a foreign insurance company, as compared with personal property of a domestic insurance company. Further, it is contended that the alleged discriminatory treatment results because Chapter 5729, Ohio Revised Code, which levies a franchise tax measured by the business done by a foreign insurance company in Ohio at the rate of two and one-half per cent of the gross premiums received less returned premiums and consideration received for reinsurance, does not contain an *in lieu of* proviso such as appears in Section 5725.25, Ohio Revised Code. Section 5725.18, Ohio Revised Code, levies an annual franchise tax upon domestic insurance companies upon the privilege of being an insurance company computed by either of two options, one of which results in an effective rate of 1.67% upon gross premiums less deductions of the same type allowed foreign insurance companies.

Section 5725.25, *supra*, provides with respect thereto, in part:

> "The real estate of a domestic insurance company shall be taxed in the place where it is located, the same as the real estate of other persons is taxed, but the tax provided for by sections 5725.01 to 5725.26, inclusive, of the Revised Code, *shall be in lieu of* all other taxes on the other property and assets of such domestic insurance company * * *" (Emphasis added.)

It has been recognized that foreign corporations cannot do business within a state except by the consent of the state —a state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. *Hanover Fire Insurance Company v. Harding (Hanover Fire Insurance Company v. Carr)*, 272 U.S., 494, 71 L.Ed., 372, 47 S.Ct., 179.

It is also well settled that:

> "A state may impose a rate of taxation upon a foreign corporation for the privilege of doing business within the state which differs from the rate that it applies to its own corporations upon the franchises which the state grants in creating them." *Cheney Bros. Co. v. Massachusetts*, 246 U.S., 147, 62 L.Ed., 632, 38 S.Ct., 295.

As was stated by the court in *Baltic Mining Co. v. Massachusetts*, 231 U.S., 68, 58 L.Ed., 127, 34 S.Ct., 15:

> "* * * Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a state to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations."

Also relative to this point is *Carmichael v. Southern Coal & Coke Co.*, 301 U.S., 495, 81 L.Ed., 1245, 57 S.Ct., 868:

> "Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation, and inequalities which result from the singling out of one

particular class for taxation or exemption infringe no constitutional limitation.

"The legislature is not bound to tax every member of a class or none, but may make distinctions of degree having a rational basis."

The appellee is not unaware of the qualification of the foregoing, as stated in the *Hanover* case, *supra*:

"* * * there is a very important qualification to this power of the state, * * * That qualification is that a state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. * * *"

However, this statement may be more readily understood by reference again to the *Carmichael* case, *supra*, in which it was said:

"Where the public interest is served, one business may be left untaxed and another taxed in order to promote the one, or to restrict or suppress the other."

See also *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S., 522, 3 L.Ed. 2d, 480, 79 S.Ct., 437, wherein it was held:

"A statute which encourages the location within the state of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the equal protection clause of the Fourteenth Amendment."

The significance of all the foregoing is that Ohio's franchise tax, as applied to both foreign and domestic insurance companies, is constitutional. Even the appellant recognizes this at page 12 of its brief when it states that it "is not challenging the discriminatory franchise tax exacted from it by the State of Ohio." In fact, the appellant "accepts the more modern line of authority" as outlined in the cases cited *supra*.

But then the appellant, although it "is not challenging" Ohio's franchise tax, immediately challenges Ohio's *ad valorem* tax and uses as a basis of its attack a provision of the Ohio franchise tax law.

It is submitted that in order to evaluate the appellant's challenge the substance of these laws must be viewed in their entirety. As stated in *Wheeling Steel Corporation v. Glander*, 337 U.S., 562, 93 L.Ed., 1544, 69 S.Ct., 1291:

> "In testing the validity of a state tax statute, the Supreme Court of the United States deals with it as an entirety as it is found in operation, and passes only on the constitutionality of that which the state has asserted power and purpose to do."

The word "lieu" is defined by Black's Law Dictionary, Fourth Edition, as follows:

> "LIEU. Fr. Place; room. It is only used with 'in;' *in lieu*, instead of. Enc. Lond."

Said authority also contains the following definition:

> "LIEU TAX. A lieu tax means instead of or a substitute for, and it is not an additional tax. Lebeck v. State, 62 Ariz. 171, 156 P. 2d 720, 721."

Webster's Third New International Dictionary defines "lieu" to mean "instead" and "in lieu of" to mean "in place of: instead of," after which appears the following example: "rendered three days' work in lieu of rent."

It is therefore perfectly clear that in its entirety the Ohio law does not "exempt" domestic insurance companies from *ad valorem* taxation of their personal property, rather their personal property is taxed in a substitute manner, *via* the imposition of a franchise tax. In the case of *Cincinnati Air Taxi, Inc. v. Bowers*, 173 Ohio St., 99, 180 N.E. 2d, 17 (1962), the phrase "in lieu of all other taxes" was before the court and with respect thereto the Supreme Court of Ohio said:

> "By Section 4561.18, Revised Code, aircraft owners are placed in a special and preferred class, and full compliance with that statute is a prerequisite to escaping the general property tax. Of course, the license taxes imposed by that section 'are *in lieu of all other taxes* on or with respect to ownership of such aircraft,' but the provision last quoted applies only where the aircraft is licensed pursuant to an application and the taxes are paid in conformity with the terms of the statute. * * *" (Emphasis added.)

So we have in reality only a substitution of a tax, which, insofar as it applies to insurance companies, is a more or less universal practice. As stated in 14 Fletcher Cyclopedia Corporations, Section 7030, at page 1031:

> "Insurance companies may be taxed either on their property or on their business, or both, i.e., a property tax may be imposed or an excise tax or both. In most states the property tax has been discarded either wholly or in part, and an excise tax substituted therefor wholly or in part, measured either by capital or capital stock, the capital with the addition of any accumulated surplus, net valuation of policies held in the state, gross earnings or receipts, net income, or by the gross or net premiums received."

Appellant's contention is, therefore, reduced to its true nature; i.e., an assertion that although a variance of rate is permissible, as between domestic and foreign insurance companies, when taxing the privilege granted to the foreign insurance companies such variance becomes impermissible if the substitution of one tax for another occurs.

In *Allied Stores of Ohio, Inc. v. Bowers, supra,* it was determined that:

> "A classification, though discriminatory, is not arbitrary nor violative of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it."

See also, *State Board of Tax Commissioners of Indiana v. Jackson,* 283 U.S., 527, 75 L.Ed., 1248, 51 S.Ct., 540, and *Carmichael v. Southern Coal & Coke Co., supra.*

It is certainly not unreasonable to conceive that the Ohio legislature intended, by its substitution of the franchise tax for the personal property tax with respect to domestic insurance companies, which is no more than "a difference in the modes of taxation" which was approved in *Concordia Fire Insurance Co. v. State of Illinois,* 292 U.S., 535, 78 L.Ed., 1411, 54 S.Ct., 830, to encourage the location of insurance companies in Ohio. In the *Concordia* case, *supra,* it was determined:

> "Unconstitutional discrimination in taxation does not exist where, though there is a difference in the modes of taxation, there is substantial equality in the resulting burden, even though there is not mathematical equivalence."

Certainly, it is not unreasonable to conceive that the legislature was cognizant of the fact that all or a large part of the premiums collected by a foreign insurance company may be withdrawn from the state, whereas the same would not ordinarily be expected with domestics. Further, all or a large part of the real estate of a domestic insurance company may reasonably be expected to be in Ohio, whereas the real estate of a foreign insurance company may reasonably be expected to be elsewhere.

The appellant has failed to show, of record, any real discrimination. The burden of establishing the unconstitutionality of a statute rests upon him who assails it. *Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S., 580, 79 L.Ed., 1070, 55 S.Ct., 538.

The aggregate effect of Ohio's laws may be to tax foreign insurance companies at a rate a fraction of a per cent higher than those upon domestic insurance companies. But

the appellant has not shown this to be unreasonably to its disadvantage. Mathematical equality is neither required nor obtainable. *Concordia Fire Insurance Co. v. Illinois, supra.*

It should be noted that the furniture and equipment here taxed are not of the type of property involved in *Southern Railway Co. v. Greene*, 216 U.S., 400, 54 L.Ed., 536, 30 S.Ct., 287; the appellant herein is not a captive of the State of Ohio, and its property is not of such peculiar nature as was involved in the *Greene* case, *supra.* Cf. *Cheney Bros. Co. v. Massachusetts, supra.*

II — Appellant Is Without Status To Make This Challenge

In *State ex rel. v. Ackerman*, 51 Ohio St., 163, 37 N. E., 828, it was held:

> "1. Foreign insurance companies and associations, whether incorporated, or not, before commencing business in this state, are required to obtain a certificate of authority to do so, from the Superintendent of Insurance."

In said case, it was held that *quo warranto* would lie against an unincorporated association because its acts "are done after the manner of corporations" and such an association "may be ousted from transacting the business of insurance within this state." The basis of the holding was that right and privilege of carrying on an insurance business is an authority which emanates from the state, and the privilege granted is a franchise.

In *Robbins v. Hennessey*, 86 Ohio St., 181, 99 N. E., 319, it was stated:

> "* * * The statutes of the state now require compliance with certain conditions designed for the security and protection of the public, and, therefore, the right to transact this business is no longer a private right, but a franchise. * * *"

And in *Renschler v. State, ex rel. Hogan*, 90 Ohio St., 363, 107 N. E., 758, *quo warranto* was allowed and a decree of ouster affirmed against an individual with the observation that:

> "It may well be questioned whether a franchise of this character, which by its very nature presupposes perpetuity, could be granted to an individual. * * *"

Section 3907.01, Ohio Revised Code, provides:

> "Any number of persons, not less than thirteen, may associate and form a company to make insurance upon the lives of individuals, and every type of insurance appertaining thereto or connected therewith, on the mutual or stock plan, and to grant, purchase, or dispose of annuities."

Section 3907.02, Ohio Revised Code, provides, in part:

> "The persons forming a company under section 3907.01 of the Revised Code *shall file* in the office of the secretary of state *articles of incorporation* * * *" (Emphasis added.)

It is thus apparent that only corporations or organizations equivalent to corporations may obtain a franchise to engage in the life insurance business in Ohio.

This raises, in modified form, the question presented in the dissenting opinion of Justices Douglas and Black, in *Wheeling Steel Corporation v. Glander, supra.*

The question there raised was whether a corporation may be a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. The instant question is more limited, to wit: Is a corporation a "person" within the Equal Protection Clause of the Fourteenth Amendment, when it is exercising a right which natural persons do not possess?

It is well established that corporations are not citizens within the Privilege and Immunity Clause of the Four-

teenth Amendment.) However, the court has historically had difficulty with the status of corporations under the Equal Protection Clause. The early cases involved questions of jurisdiction, the rights to sue or be sued, and matters of contract. It was initially held that the rights of a corporation depended upon the citizenship of its members. Later, for purposes of jurisdiction, it was presumed that the members of the corporation were citizens of the state of incorporation. This history is set out in *Paul v. Virginia*, 75 U.S., 168, 19 L.ed., 357, 8 Wall., 168.

Then, suddenly, came the announcement in *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S., 394, 30 L.ed., 118, 6 S.Ct., 1132 (1886):

> "Announcement by Mr. Chief Justice Waite:
> "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of opinion that it does."

Thus, without argument a decision of great importance was made, a decision which, according to some historians, implied that something was hidden in the Fourteenth Amendment of which the ratifiers and all but a few of the drafters were totally unaware. See The Conspiracy Theory, 47 Yale Law Journal, 371.

Then followed a series of opinions by Justice Fields. At first, the "soundness" of the "position, that corporations are persons within the meaning of the clause in question" was "admitted" by the court upon the authority of the *Santa Clara County* case, *supra*. See *Minneapolis and St. Louis R. Co. v. Beckwith*, 129 U.S., 26, 32 L.ed., 585, 9 S.Ct., 207.

Next—it was said that "'Private corporations are persons within the meaning of the amendment; it has been so

held in several cases by this court * * *'' and the court was again relying primarily upon the *Santa Clara County* case, *supra*. See *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U.S., 386, 35 L.ed., 1051, 12 S.Ct., 255.

Finally, it was stated by Justice Brewer in 1897:

> "It is well settled that corporations are persons within the provisions of the 14th Amendment of the Constitution of the United States. * * *''

And in making this statement, principal reliance was again upon the *Santa Clara* case, *supra*. See *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S., 150, 41 L.ed., 666, 17 S.Ct., 255.

Thus, in the space of eleven years, a proposition announced, without argument, became "well settled," and all by reliance upon the original, unargued case. So the present position is that corporations are not citizens but are persons. When this is applied to foreign corporations admitted to do business in a state other than that in which originally created, it results in a most peculiar concept. In brief, a state is not required to admit a foreign corporation at all, but if it does, it must thereafter extend "equal protection," unless it has conditioned the admission (see *Lincoln National Life Ins. Co. v. Read*, 325 U.S., 673, 89 L.ed., 1861, 65 S.Ct., 1220), in which event it may not discriminate against the admitted corporation for the initial period for which admitted but may thereafter refuse altogether to allow continuance of business in the state.

This position is self contradictory. It denies a state a right to discriminate unless as a condition to admission it reserves the right to the ultimate discrimination, i.e., complete and arbitrary refusal of continued admittance or, in reality, expulsion. Furthermore, the general position itself is sometimes found to be so unrealistic as to contribute to gross injustice and is therefore ignored. See *Venice Hunting & Trapping Co. v. Salinovich*, 10 F.2d, 222.

It is submitted that the time has come to recognize certain fundamental facts, dictated by basic logic:

First, the word "persons" was used in the Equal Protection Clause of the Fourteenth Amendment because it was recognized that there were many people in this country who were neither native born nor naturalized.

Second, a corporation is not a person, except to the extent that it is made so by the state which creates it, or, in the case of foreign corporations, to the extent made so by a state which admits it to do business within its jurisdiction.

Third, in creating or admitting a corporation, a state may, for special purposes, endow it with rights superior to those of individual citizens.

Fourth, to the extent that a corporation may be created or admitted into a state to exercise those rights which citizens may exercise, it may be made a person and in that capacity entitled to equal protection. However, to the extent that a corporation may be created or admitted to exercise rights superior to those which a citizen may exercise, it is in fact superior to a "person" and when claiming to exercise rights peculiar to that capacity it is not a "person" within the scope of the Fourteenth Amendment to the Constitution.

CONCLUSION

The Ohio taxing system as applied to the appellant does not, when viewed in its entirety, violate the Fourteenth Amendment to the Constitution of the United States. Ohio does not exempt domestic insurance companies from *ad valorem* taxes while taxing foreign insurance companies. Ohio does substitute within its franchise tax structure so that the franchise tax paid by domesties is *in lieu* of an *ad valorem* tax on their personal property. However, when viewed in its entirety, the aggregate result is not an unreasonable discrimination against the appellant herein. Appellant's objection runs primarily to the mode employed by Ohio in making this distinction, a distinction which Ohio has a constitutional right to make. It is respectfully submitted that when viewed as an entirety both the system of taxation and the results thereof, in Ohio, are within the scope of constitutional action under the Fourteenth Amendment, as defined by decisions of this court. Such being the case, the appellant herein cannot prevail. It may have preferred to see Ohio employ a different mode or manner to arrive at the same result, but this is not a basis for declaring a statute unconstitutional. Finally, the appellant is engaged in a business which is peculiar to corporations, a business which individual persons cannot pursue in Ohio. Appellant in this instance is, therefore, not a person within the scope of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Consequently, the decision appealed from should be affirmed.

Respectfully submitted,

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